



**LEGAL DEPARTMENT**

**RANDALL D. FISHER**  
General Counsel

**JOHN B. GLICKSMAN**  
**ATHENA JAMESON**

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January 8, 1993

**VIA FEDERAL EXPRESS -- AM DELIVERY**

Ms. Donna R. Searcy, Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, DC 20554

Re: MM Docket Number 92-262

Dear Ms. Searcy:

I am transmitting herewith, on behalf of Adelphia Communications Corporation ("Adelphia"), an original and nine copies of Adelphia's Comments in the above-referenced proceeding.

I have also enclosed an additional copy of Adelphia's Comments, which I request that you date-stamp and return to me in the enclosed self-addressed stamped envelope.

Should there be any questions regarding the foregoing, please contact me directly.

Respectfully submitted,

John B. Glicksman  
Assistant General Counsel

JBG/kjs

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FEDERAL COMMUNICATIONS COMMISSION  
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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

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In the Matter of )  
 )  
Implementation of Section 3 of the ) MM Docket  
Cable Television Consumer Protection and ) No. 92-262  
Competition Act of 1992 )  
 )  
Tier Buy-Through Prohibitions )  
 )

COMMENTS OF ADELPHIA COMMUNICATIONS CORPORATION

Adelphia Communications Corporation ("Adelphia") hereby comments on the Commission's Notice of Proposed Rule Making ("NPRM") issued in the above-referenced matter.

In its NPRM, the Commission states that it is seeking comment on the adoption and implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992"). Section 3 of the Cable Act of 1992 requires that the Commission prescribe regulations to prevent evasions of the prohibitions relating to the general rate regulation rules. These prohibitions include a prohibition on requiring subscribers to purchase any "tier" of service, other than the basic service tier, as a condition of access to video programming offered on a per channel or per program basis.

It appears that, as a procedural matter, the Commission may be limited in the types of regulations that it may promulgate based upon the content of the NPRM. As noted below, to appropriately promulgate regulations, the Commission must give adequate notice of the actions it proposes to take; the NPRM, however, gives limited notice as to what the Commission presently contemplates.

The Administrative Procedure Act, 5 U.S.C. §551 et seq. ("APA"), requires that in issuing a general notice of proposed rule making, the Commission shall provide the public with either the terms or substance of a proposed rule or a description of the subjects and issues involved. See 5 U.S.C. §553(b)(3). In practice, this requirement means that the Commission

must provide sufficient factual detail and rationale to permit interested parties to comment meaningfully. See Florida Power & Light Company v. U.S., 846 F.2d 765, cert. denied, 109 S.Ct. 1952, 490 U.S. 1045, 104 L.Ed. 2d 422. The Commission is not obligated to describe every precise proposal, see Daniel Intern. Corp. v. Occupational Safety and Health Review Commission, 656 F.2d 925 (4th Cir. 1981), but the Commission is obligated to tell the public what it intends to do, see American Public Gas Association v. Federal Power Commission, 498 F.2d 718 (D.C. Cir. 1974). The Commission may not merely address relevant subjects, see Kollett v. Harris, 619 F.2d 134 (1st Cir. 1980); rather, the Commission must set forth the substance of the proposed action, see National Indus. Traffic League v. U.S., 396 F.Supp. 456 (D.D.C. 1975).

It does not appear that the Commission has included in its NPRM the kind of notice of proposed action that is contemplated by the APA; accordingly, it appears that the Commission's ability to promulgate valid regulations on the basis of the NPRM is limited. The Commission begins, for example, by requesting information on the current state of the cable industry's technological capabilities, and on the existence of particular kinds of equipment in conjunction with other system characteristics. NPRM, at ¶ 4. In requesting this information, the Commission indicates clearly that it does not have a firm "understanding of the technical processes and equipment involved in providing and preventing subscribers' access to individual programs and channels and groups of channels carried on a cable system," which the Commission acknowledges is "fundamental to any regulation implicating tiering practices of cable system operators." NPRM, at ¶ 4. Although Adelphia agrees with the Commission that the Commission needs a clear understanding of technical processes and equipment in order to promulgate appropriate regulations, it is difficult to see how a document in which the Commission acknowledges that it does not yet have such an understanding can be said to give the public adequate notice of any subsequent Commission action.

The Commission also seeks comment on how it should define "discrimination" for purposes of Section 3 of the Cable Act of 1992, and the Commission seeks comments on how the Commission should determine when such discrimination has occurred. NPRM, at ¶ 7. Again, although Adelphia agrees with the Commission that these are appropriate inquiries for the Commission to make, it is difficult to see how the Commission can, consistent with the dictates of the APA, promulgate regulations on the basis of such threshold inquiries.

The Commission also asks for comment concerning circumstances in which waivers of the buy-through prohibitions would be necessary and appropriate. NPRM, at ¶ 9. Once again, the Commission has posed an appropriate but threshold inquiry, without giving any sort of indication of how it intends to proceed. Likewise, the Commission asks for comments on accomplishing the Congressional directive to reduce administrative burdens and cost of compliance for smaller cable systems when implementing the buy-through restrictions. Here, too, the Commission asks appropriate but threshold questions that do not appear to give any indication of how the Commission intends to proceed with regard to at least certain aspects of the enforcement process.

The Cable Act of 1992 states that the Commission must prescribe regulations in this proceeding by April 3, 1993. In the context of other regulations that the Cable Act of 1992 requires the Commission to prescribe, it is clear that the Commission does not have an abundance of time or resources to fulfill its obligations under the Cable Act of 1992. These facts do not relieve the Commission, however, of its need to fulfill its obligations under the APA. Accordingly, the Commission must ensure that it gives the public fair notice of what it intends to do, and that it does not allow the time frame imposed on it by Congress to force it to promulgate regulations other than in accordance with the requirements of applicable law.

Respectfully submitted,

ADELPHIA COMMUNICATIONS CORPORATION

By  \_\_\_\_\_

Randall D. Fisher

General Counsel

John B. Glicksman

Assistant General Counsel

5 West Third Street

Coudersport, PA 16915

(814)274-9830

January 8, 1993